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No. 81-2406

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CITY OF POLSON, MONTANA,
Petitioner,

v.

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the Flathead Indian Reservation was disestablished by the Act of April 23, 1904, ch. 1495, 33 Stat. 302.*

* Respondents will restate and address the "ownership" and "regulatory" issues in a separate Brief in Opposition to the separate Petition for a Writ of Certiorari to the Ninth Circuit filed by the State of Montana and the Namens in No. 82-22 (hereinafter cited as Petition and Namen Petition, respectively).

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This litigation began in 1973, when the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana (hereinafter "the Tribes"), and the Chairman of the Flathead Tribal Council sued certain non-Indian owners of Reservation land in the United States District Court for the District of Montana, seeking declaratory and injunctive relief against the defendants for trespassing on tribal lands. The district court held, *inter alia*, and the court of appeals agreed, that all lands within the original boundaries of the Flathead Indian Reservation are still part of that Reservation. *Confederated Salish and Kootenai Tribes v. Namen*, 380 F. Supp. 452, 464 (D. Mont. 1974), Appendix to Namen Petition ("App.") at 178, *aff'd*, 534 F.2d 1376 (9th Cir.), App. at 202-05, *cert. denied*, 429 U.S. 929 (1976) ("*Namen I*").

In 1975, the City of Polson, Montana, sued the Tribes, seeking a declaratory judgment that the Flathead Reservation had been disestablished, or terminated, by the Flathead Allotment Act, Act of April 23, 1904, ch. 1495, 33 Stat. 302, App. at 236-43. The State of Montana intervened as a plaintiff in that case. In 1977, the United States filed a separate suit, as the Tribes' trustee, against the City of Polson and the State of Montana, asking for a declaratory judgment that the Flathead Reservation had not been disestablished or diminished by the 1904 Act. Both of those cases were consolidated with the original *Namen* case.

Following exhaustive briefing on the termination issue, on September 20, 1979, Judge Jameson ruled, in a careful and comprehensive memorandum decision, that the Flathead Allotment Act did *not* terminate or diminish the Flathead Reservation. *Confederated Salish and Kootenai Tribes v. Namen*, Civ. No. 2343 (D. Mont. Sept. 20, 1979) (memorandum decision). On April 8, 1980, he issued an opinion affirming that ruling and incorporating a substantial part of the memorandum decision. *Confederated Salish and Kootenai Tribes v. Namen*, Civ. No. 2343 (D. Mont. April 8, 1980), App. at 35-155 (*"Namen II"*). The United States Court of Appeals for the Ninth Circuit affirmed Judge Jameson's decision on the termination issue on January 11, 1982. The court of appeals ruled: "Since neither the Act on its face nor the surrounding circumstances and legislative history make it clear that Congress intended to terminate the Flathead Reservation, we affirm the district court's finding that there has been no such termination." *Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951, 960 (9th Cir. 1982), App. at 2-34, (*"Namen III"*).

The City of Polson ("Polson") has asked this Court to review that decisoin. For the reasons set forth hereinbelow, the Tribes submit that Polson's petition for a writ of certiorari should be denied.

REASONS FOR DENYING THE WRIT

By the 1855 Treaty of Hell Gate, July 16, 1855, 12 Stat. 975, App. at 206-16, the Tribes reserved for their own exclusive use and benefit certain lands which thereafter came to be known as the Flathead Indian Reservation. 12 Stat. at 975-76, App. at 207-08. The courts below have held and the Tribes contend that the lands within the treaty boundaries of the Flathead Indian Reservation remain as and continue today to constitute the Flathead Indian Reservation. Polson argues that the Flathead Reservation was terminated or "disestablished" by the Act of April 23, 1904. Respondents submit that the language of the 1904 Act, its legislative history, and the circumstances and events surrounding and subsequent to its enactment mandate the conclusion that Congress did *not* terminate, "disestablish" or otherwise diminish the boundaries of the Flathead Reservation.[1]

I. The Ninth Circuit's Ruling on Disestablishment of the Flathead Reservation Is Entirely Consistent with the Decisions of this Court

In support of its Petition, Polson argues that the Ninth Circuit's decision on disestablishment is inconsistent with the controlling decisions of this Court; it suggests that the Court should once again further define the principles governing interpretation of acts opening Indian reservations to non-Indian settlement.

Respondents submit that there is absolutely no need for further guidance from this Court on this issue. This

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[1] It should be noted at the outset that Polson stands alone in challenging this portion of the Ninth Circuit's decision; the State of Montana, apparently agreeing with the lower court ruling, does not ask this Court to review the disestablishment issue.

Namen and the State of Montana state in their petition: "From the decision on the *regulatory and ownership issues*, Namen and the State of Montana petition this Court for a Writ of Certiorari to issue to the United States Court of Appeals for the Ninth Circuit." Namen Petition at 7 (emphasis added).

Court has already—on more than one occasion—articulated clear and precise principles to guide the lower courts in determining whether an Indian reservation has been disestablished or diminished by an act of Congress. It need not do so again.

It is well-settled that the effect of a statute providing for Indian allotments and non-Indian settlement depends on the intent of Congress. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586 (1977); *DeCoteau v. District County Court*, 420 U.S. 425, 444, *reh'g denied*, 421 U.S. 939 (1975); *Mattz v. Arnett*, 412 U.S. 481, 505 (1973); *Seymour v. Superintendent*, 368 U.S. 351, 358-59 (1962).[2] In order to diminish or terminate an Indian reservation, congressional intent to achieve such a result must be "expressed on the face of the Act or be clear from the surrounding circumstances and the legislative history." *Mattz v. Arnett*, *supra*, 412 U.S. at 505.

In the instant case, these controlling legal principles have been applied in a manner entirely consistent with the decisions of this Court. Both the Court of Appeals for the Ninth Circuit (*"Namen III"*) and the District Court for the District of Montana (Judge Jameson) (*"Namen II"*) conducted a careful and extensive analysis of the evidence presented by the parties in light of these principles, and concluded that the Flathead Allotment Act did *not* terminate or diminish the Flathead Reservation.

The evidence supporting this ruling is substantial and compelling. First, as the court of appeals noted in *Namen III*, the face of the Flathead Allotment Act does not express an intent to terminate the Reservation.

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[2] As the Court stated in the *Rosebud Sioux* case, "in all cases, 'the face of the Act,' the 'surrounding circumstances,' and the 'legislative history' are to be examined with an eye toward determining what congressional intent was." *Rosebud Sioux Tribe v. Kneip*, *supra*, 430 U.S. at 587 (quoting *Mattz v. Arnett*, *supra*, 412 U.S. at 505). *See also DeCoteau v. District County Court*, *supra*, 420 U.S. at 444.

Namen III, *supra*, 665 F.2d at 955-56, App. at 11. The language of the Act, providing only for the survey and allotment of Reservation lands, for the sale and disposal of surplus allotted lands, and for the opening of such surplus lands to settlement and entry, closely parallels the language found by this Court in *Seymour*, *not* to have altered reservation boundaries. *Seymour v. Superintendent*, *supra*, 368 U.S. at 355. The Act contains no language—such as the cession language in the 1904 Act at issue in *Rosebud Sioux*,[3]—"precisely suited" to disestablishment. *See Rosebud Sioux Tribe v. Kneip*, *supra*, 430 U.S. at 597. The presence or absence of such "precise" language is a key indicator of congressional intent to extinguish or diminish a reservation.

Second, and equally important, is the absence of any cession agreement between the Flathead Indians and the United States government. In 1896, Congress authorized the appointment of a commission to negotiate with the Confederated and other Tribes for cessions of portions of their respective Reservations.[4] The record in this case reveals that the commission's attempts to obtain such an agreement were consistently and unequivocally rebuffed by the Indians, and the commission ended its futile efforts in 1901. *See Namen III*, *supra*, 665 F.2d at 957, App. at 14-15; *Namen II*, *supra*, slip op. at 16-19, App. at 54-58. This is in sharp contrast to *Rosebud Sioux*, where the 1904 statute diminishing that Reservation expressly incorporated and ratified a 1901 cession agreement with the Tribe, and is consistent with this Court's emphasis on the presence of a cession agreement as a prerequisite to a finding of diminishment. *See Rosebud Sioux Tribe v. Kneip*, *supra*, 430 U.S. at 591-92.

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[3] The Act of April 23, 1904, ch. 1484, 33 Stat. 254, 256, states that "The said Indians . . . do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to . . . Gregory County."

[4] Act of June 10, 1896, ch. 398, 29 Stat. 321, 341-42.

Other important factors further reinforce the lower courts' conclusion. For example, one of the sections in the first version of the Flathead Allotment Act referred to the "tract herein ceded," but Congress changed this language to "in the tract under consideration"; it did so expressly because the Tribes had not agreed to a cession and none was contemplated. *Namen III*, *supra*, 665 F.2d at 956, App. at 14. As the court of appeals noted, "the change strongly suggests congressional recognition that reservation lands were not being ceded, and hence the reservation status was not being terminated." *Id.* Furthermore, the presidential proclamation that formally announced the Reservation opening to non-Indian settlement contains no mention of cession or "former Reservation." The court of appeals correctly found that this is in direct contrast to the proclamation in *Rosebud Sioux*, which contained strong cession language and which was viewed by this Court as "an unambiguous, contemporaneous, statement, by the Nation's Chief Executive, of a perceived disestablishment of Gregory County." *Namen III*, *supra*, 665 F.2d at 959, App. at 20 (*quoting Rosebud Sioux Tribe v. Kneip*, *supra*, 430 U.S. at 602-03).[5] And, finally, unlike the situations in *Rosebud Sioux* and *DeCoteau*, there has not been a continuous unchallenged assumption of state jurisdiction over the lands in question on the Flathead Reservation.[6] The court of appeals

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[5] Polson claims that the significance attributed by the Court to the proclamation is "puzzling . . . given the absence of any such conclusion in *Rosebud* regarding substantially similar proclamations." Petition, p. 30. Actually, it is Polson's reasoning that is puzzling; clearly it is the *difference* between these proclamations—the strong cession language in the Rosebud Sioux proclamation, and the absence of such language in the Flathead proclamation—that *is* significant.

[6] Polson incorrectly asserts (Petition, pp. 20-21) that all parties agree that, from the Reservation's opening until 1951, Montana and its political subdivisions assumed "complete jurisdiction over both Indians and non-Indians on non-trust lands within the original reservation boundaries." Instead, the Tribes admitted only that the

emphasized that federal and State courts consistently have ruled that the Flathead Reservation extends to its original 1855 boundaries.[7]

In contending that the ruling of the court of appeals is inconsistent with this Court's prior decisions, Polson highlights two isolated facts—section 8 in the Flathead Allotment Act, granting two sections out of every township to Montana for school purposes, and section 21, a 1909 amendment,[8] extending the federal ban on liquor in Indian country to surplus lands in the Reservation—which are similar to provisions that this Court said supported a finding of intent to diminish the Rosebud Sioux Reservation. Both the court of appeals and the district court considered these and other arguments, but properly found that they were far outweighed by more numerous and much more significant indicia that Congress did *not* intend in 1904 to extinguish the Flathead Reservation.

II. The Decision of the Court of Appeals On Disestablishment Is *Sui Generis* and Is of Local, Not National, Importance

The only real issue Polson raises in its Petition turns on the particular facts of this case and this case alone.

State had assumed limited jurisdiction over non-Indians and "*citizen Indians*," that is, Indians who had obtained fee patents to their allotments. *Namen II*, *supra*, slip op. at 30-31, App. at 72-74. The Tribes, at least since 1934, have asserted jurisdiction over *all* lands, including fee lands, within the original exterior boundaries of the Flathead Reservation. *See Namen II*, *supra*, at 31-32, App. at 75-76.

[7] In 1951, the Montana Supreme Court ruled in *State ex rel. Irvine v. District Court*, 239 P.2d 272 (Mont. 1951), that the State had no jurisdiction over major crimes on the Flathead Reservation, and in 1973 it held in *Security State Bank v. Pierre*, 511 P.2d 325, 328-30 (Mont. 1973), that Montana had no jurisdiction over a civil dispute between an Indian and a non-Indian at Polson, Montana, located within the exterior boundaries of the Reservation. *See Namen III*, *supra*, 665 F.2d at 959, App. at 19.

[8] Act of March 3, 1909, ch. 263, 35 Stat. 781, 795.

Indeed, it is inherent in the disestablishment issue that each case must be decided on the basis of unique treaties, statutes, and historical facts. *See DeCoteau v. District County Court, supra,* 420 U.S. at 447; *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 172 and n.8 (1973); *United States v. Dupris,* 612 F.2d 319, 321 (8th Cir. 1979), *vacated and remanded,* 446 U.S. 980 (1980); *United States ex rel. Cook v. Parkinson,* 525 F.2d 120, 123 (8th Cir. 1975), *cert. denied,* 430 U.S. 982 (1977); *United States ex rel. Condon v. Erickson,* 478 F.2d 684, 689 (8th Cir. 1973). In essence, Polson asks the Court to make a third review of the lengthy and complex record to look for what two courts, after careful and comprehensive study, have been unable to find—unequivocal evidence of a congressional intent to extinguish the Flathead Reservation. Such evidence simply does not exist.

Perhaps most importantly, resolution of the disestablishment issue herein is of interest only to the parties before this Court. It has no national significance. No new issues are presented; no new law has been proclaimed—there has been only a careful application by two federal courts of established Supreme Court principles to one Indian Reservation. Certiorari, therefore, should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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